

Claimant argues that the respondent's appeal should be dismissed as the Board has no jurisdiction to consider this matter.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant suffered a compensable injury on November 28, 2007 and required spinal surgery. Dr. Theo Mellion was allowed to perform this surgery as he was a preferred provider under claimant's health care plan. Unfortunately, during surgery a piece of metal from an instrument became lodged in claimant's spine and remains in her body. Respondent then redirected claimant's medical care to Dr. Douglas Burton, a physician in Kansas City, Kansas.

Dr. Burton initially prescribed physical therapy, but when that provided no positive relief, he recommended surgery. Both claimant and Dr. Burton believed that a second opinion as to the surgery was warranted and Dr. Burton referred claimant to Dr. John Gorecki, a neurosurgeon who practices in Wichita. Dr. Gorecki also recommended surgery.

Based on this recommendation, as well as her confidence in Dr. Gorecki, claimant sought a change of physician. Claimant indicated that she not only had confidence in Dr. Gorecki, a neurosurgeon, but that she had concerns with respect to Dr. Burton, an orthopaedic surgeon. Apparently claimant believed Dr. Burton was speaking with the case manager outside of her presence regarding her case. She is further concerned that she would have to travel to Kansas City for her surgery thus taking her away from her support system and complicating her recovery. Moreover, Dr. Burton is refusing to provide her with ongoing medications since claimant has now sought a change of physician. As a result, claimant's pain level has increased dramatically.

To further complicate matters, respondent's carrier terminated TTD benefits on August 6, 2008 based upon claimant's decision to pursue a change of physician. There is no indication that claimant's condition has improved as of August 6, 2008 and in fact, her condition has, based on her testimony, significantly diminished.

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.<sup>1</sup>

Here, respondent alleges the ALJ exceeded his jurisdiction in granting claimant's request to change her authorized treating physician to Dr. Gorecki. But, as claimant notes in her brief, the Board has ruled in the past and continues to hold that this is not a jurisdictional issue subject to review on an appeal from a preliminary hearing Order.<sup>2</sup> Whether the ALJ must, in a given set of circumstances, authorize treatment from a list of three physicians designated by respondent is not a question which goes to the jurisdiction of the ALJ. An ALJ has the jurisdiction to decide this question.

The respondent contends that if an appeal is not permitted on this issue "this type of action by an administrative law judge could never be effectively challenged. A judge could allow a claimant to name the Mayo Clinic to treat poison ivy and it would not be appealable by that interpretation."<sup>3</sup> This Board Member disagrees.

While there is generally no jurisdiction to consider matters of medical treatment, whether an ALJ exceeds his or her jurisdiction is jurisdictional. After a thorough review of the file this Board Member finds nothing to suggest that the ALJ exceeded his jurisdiction in making his decision. ALJ's must routinely determine the most appropriate method of treatment in order to satisfy the Act's goal of curing and relieving the effects of the injury.<sup>4</sup> Selecting one treatment provider over another does not equate to a decision that exceeds one's authority. Rather, as is contemplated under K.S.A. 44-534a, the ALJ determined an issue regarding the furnishing of medical treatment.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.<sup>5</sup> Accordingly, respondent and carrier's appeal is dismissed.

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<sup>1</sup> See K.S.A. 44-551.

<sup>2</sup> See *Spears v. Penmac Personnel Services, Inc.*, No. 1,021,857, 2005 WL 2519628 (Kan. WCAB Sept. 30, 2005); *Briceno v. Wichita Inn West*, No. 211,226, 1997 WL 107613 (Kan. WCAB Feb. 27, 1997); *Graham v. Rubbermaid Specialty Products*, No. 219, 395, 1997 WL 377947 (Kan. WCAB June 10, 1997).

<sup>3</sup> Respondent's Brief at 6 (filed Sept. 25, 2008).

<sup>4</sup> K.S.A. 44-510h(a).

<sup>5</sup> See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>6</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the respondent's appeal of the Order of Administrative Law Judge Thomas Klein dated September 8, 2008, is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November 2008.

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JULIE A.N. SAMPLE  
BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant  
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge

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<sup>6</sup> K.S.A. 44-534a.